

ROLE OF PROBATION IN THE EXECUTION OF EDUCATIONAL NON-CUSTODIAL MEASURES APPLICABLE TO MINORS IN THE NEW PENAL CODE OF ROMANIA

CONSTANTIN TODIRIȚĂ

Probation Service Braşov – Department of Probation, Ministry of Justice

Modernity of the new Penal Code of Romania on the field of criminal treatment for minors consists first in waiving penalties and regulation of a single system of punishment for the juveniles who are criminally responsible. It contains educational measures, four non-custodial and two custodial. After 10 years since its establishment, the challenges for Romanian probation system are to (re-)formulate working mechanisms within the justice system and to (re-)thinking approach with families and support networks of minors.

But the proposed changes will take place in a socio-economically context less favourable, under conditions of austerity budgets and limitations of human and material allocated resources. On the above mentioned situation a performance management solution for educational non-custodial measures is attracting the community structures in probation activities, probation service assuming the responsibility of managing the supervisory process. In this presentation we will follow the characteristics and directions of development of the juvenile justice system from the new Penal Code perspective focusing on educational non-custodial measures.

Keywords: case manager, educational non-custodial measures, justice system, minors, probation.

1. INTRODUCTION

The adoption of Law no. 286/17.07.2009 as concern Penal Code¹ represents a fundamental stage of the process of adjusting the Romanian Penal Code to the high requirements of European and International community. The regulation of minority is “one of the most important issue of the reform proposed within the frame of new Penal Code” as is stipulated at point 2.35 from the explanatory memorandum accompanying the Project of the Law regarding the Penal Code, the variant sent to Parliament.

By passing up the mixed punishment [http://www.dictionar-roman-englez-online-pedeapsa.html](http://www.dictionar-roman-englez-online.ro/dictionar-roman-englez-online-pedeapsa.html) system of the minors who

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are penal responsible, system made by educational measures and penalties settled by the Penal Laws in force and consecration of an unique enforcement system into the new Penal Code of Romania, exclusively composed by educational measures, it reaches to a significant qualitative leap in sorting the punishment system of the under age. From any interrogation direction – biological, psychological or sciences of education – the age of infancy is understood like a clear stage of human being's becoming, the minors are persons who are not completely formed as bio-psychological human being, they are in process of transforming from biological individual into a social human being.

The acknowledgement of this age characteristics, the role of the family and the significance to follow up the growing and educational process of the minor offenders is reflected on Romanian lawgiver option to underline the educational side of recovering solutions as concern the under age offenders and also, to give community (re-)building a chance in Justice for the minors management.

Since on this presentation we'll follow the particularities of the Justice system for the minors on the frame of new Penal Code of Romania with emphasis on execution of educational non-custodial measures, inspired by Spanish legislation and from regulation of French Law, we'll also consider the comparative introduction of all three Justice systems for the under age.

2. SYSTEMS OF JUSTICE FOR THE MINORS: ROMANIA, FRANCE AND SPAIN

In Romania, the conditions of the Criminal responsibility of the minors are settled down by the Penal Code, unlike the French and Spanish Justice system for the minors, which have special laws applicable to under age that complete or derogate from Penal Code disposals. For France, the premises of the material is located on Ruling no. 45-174 dated 2nd of February 1945², regarding the juvenile delinquency and on Penal Code³ norms, regulations altered by Law no. 2002-1138 dated 9th of September 2002⁴. In Spain, the disposals as concern the minors are framed into the Penal Code⁵, the Organic Law no. 5/2000 concerning the settlement of the minor's criminal liability⁶ and in the Implementing Regulations of this law⁷.

² Ordonnance n°45-174 du 2 février 1945 relative à l'enfance délinquante, JORF du 4 février 1945 rectificatif JORF 6 et 21 mars 1945.

³ Loi n° 92-686 du 22 juillet 1992 parue au JO n° 169 du 23 juillet 1992 (rectificatif paru au JORF n° 298 du 23 décembre 1992).

⁴ Loi n°2002-1138 du 9 septembre 2002 d'orientation et de programmation pour la justice, JORF n° 299 du 24 décembre 2002

⁵ Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal, BOE núm. 281/1995, de 24 de noviembre de 1995.

⁶ Ley Orgánica 5/2000, de 12 de enero, reguladora de la responsabilidad penal de los menores, BOE núm. 11/2000, de 13 de enero de 2000.

⁷ Real Decreto 1774/2004, de 30 de julio, Reglamanto de la Ley Orgánica 5/2000, de 12 de enero, reguladora de la responsabilidad penal de los menores, BOE núm. 209/2004, de 30 de agosto de 2004.

The new Romanian Penal Code keeps the settlement of the minor's criminal liability limits which exists on the operative Penal legislation, the proposal from the Project sent to the Parliament by Government – to diminish the age limit from where is possible to start the Criminal Liability of the minors from 14 years to 13 years – has not been voted by the Romanian Lawgiver.

As concern the total lack of criminal liability for the minors less than 14 years, settled by art. 113, paragraph 1 from the new Penal Code, it comes out that a similar disposal is on the Spanish legislation, art. 3 from Organic Law no. 5/2000, while art. 122-8 from the French Penal Code establishes the principle of absolutely lack of criminal liability for the minors under 13 years.

If in all three Justice Systems for the minors the age of penal responsibility is the same with the age of penal majority, from which the common penal law is applied to any transgressor, being 18 years old, the situation is different regarding the lack of relative penal responsibility of the minors, 16 years in Romanian legislation, 13 years in French legislation and 16 years in Spanish legislation.

Regarding the punishment system applicable to minors, we establish the important step achieved by the new Romanian Penal Code, the option for a system composed only by educational measures is similar with the system of measures for minors taken by Spanish legislation, giving up the traditional model that is still available in France and which settle down a mixed punishment conditions, made by educational measures, mediation-rehabilitation and punishment.

We also mention that on the Spanish Penal Law context there are no measures that could be applied as an alternative to the prosecution, while the French Penal Legislation establishes the institution of renunciation of penal pursuit art. 41-2 from the French Penal Procedure Code, altered by Law no. 2011-525 dated 17th of May, 2011, for simplification and improvement of the Law quality⁸, the institution of renunciation of penal pursuit is taken over by Romania Penal Legislation, art. 318 from Law no. 135/2010 regarding the Penal Procedure Code⁹.

The new Justice system for minors in Romania enlarges the number of sanction possibilities for the minors who are penal responsible and settle six educational measures, four non-custodial and two custodial. According with art.115 from the new Penal Code of Romania, the educational non-custodial measures are the stage of civil education, supervision, consignment during the weekend and daily assistance; the educational custodial measures consist of the internment into an educational center and the internment into a confinement centre.

The responsibility of the enforcement of educational non-custodial measures belongs to Probation Service and in case of educational custodial measures the responsibility belongs to the specialized units subordinated to National Administration of Penitentiary. Differently, in France the competence of the

⁸ Loi n°2011-525 du 17 mai 2011 de simplification et d'amélioration de la qualité du droit parue au JORF n°115 du 18 mai 2011 (rectificatif paru au JORF n°121 du 25 mai 2011).

⁹ Published in the Official Gazette, Part I, no. 486 of July 15, 2010.

enforcement of freedom non-privative educational measures doesn't belong to Probation Service but to another structure of the Ministry of Justice, P.J.J. (la protection judiciaire de la jeunesse). In Spain, according with art. 8 of Royal Decree no.1774/2004 that approves the implementing of the Law no. 5/2000 the functional competence belongs to public entities designated by the autonomous communities and the autonomous cities of Ceuta and Melilla; for example, in Catalonia case, the same organism it's involved in implementing of those measures, Directorate General of Alternative Penal Measures and Juvenile Justice (DGMPAJJ).

3. EDUCATIONAL NON-CUSTODIAL MEASURES IN NEW CRIMINAL CODE OF ROMANIA

Through educational measures are available to the courts a wider range of sanctions that juvenile courts may choose a penalty that takes into account the interests of the child, by ensuring the maintenance and strengthening ties with family and community minor which he belongs and measure the adequacy of the contents of the age, personality, health, family and social situation of the minor, depending on the severity of the crime committed and the minor danger. In terms of educational measures is usually referred to art. 116 (1) new Romanian Criminal Code – to the minor at the time of the offense, be aged between 14 and 18 take a non-custodial educational measure, and the exception is regulated by art. 116 (2) – custodial measures in case of serious offenses against minors who have committed more crimes.

Diversification of educational non-custodial measures in the new Criminal Code of Romania respects the principle of gradualism severity in terms of several criteria: the content of the measure, measure the duration, intensity of supervision and control, persons and institutions involved and the costs necessary for enforcing them.

A specific feature of educational non-custodial measures enshrined in the new criminal law is that they provide the carrying out minor tasks or compliance activities prohibitions contained in the content of the measure, such as participation in civic educational course or banned from leaving home weekends, the court may impose minor during the execution of any of the four educational non-custodial measures deprivation of one or more activities or prohibition of the obligations are to art. 121 of the new Criminal Code of Romania:

- “To attend school or vocational education.
- Not to exceed, without the approval of the probation service, the territorial limits established by the court.
- Not to be in certain places and at some sports, cultural events or other public meetings, established by the court.
- Not to be nearby or communicate with his victim or member of his family, with other offenders or other persons established by the court.

- To come at the probation service according to a schedule set.
- To comply with control measures, treatment or medical care”.

Educational measures targeting non-detention of freedom on the side of the educational and formative shows both rank as law obligation in the enumeration, and the provision that participation in the civic course shall be made without affecting the schedule of the minor’s school or professional supervision is carried out once in order to ensure the minor’s participation in the school or training.

Civic education is an a educative measure which has no equivalent in the criminal code in force. It modeled on the French law, art. 15-1, point 6 of Ordinance No. 45-174 of 2 February 1945 concerning juvenile delinquency, where the training is regulated as a penalty. Civic training program is organized in collective sessions, continuous or discontinuous, composed of different modules adapted to the age and personality of the minor, does not last more than a month, and day to day duration this cannot last for more than 6 hours.

In the new Romanian Criminal Code, the civic educational program, as set out in art. 117, consists in the obligation of the minor to participate in a program with a duration of not more than 4 months in order to help him understand the legal and social consequences of his behavior. The organization and ensuring the participation and supervision of the minor, during the course of civic education, under the auspices of the probation service.

Supervision is the only measure which has a correspondent in the criminal code in force, supervised freedom, provided for in art. 103, but the educational surveillance measure was envisaged and the provisions of Spanish law, supervised freedom provided for in art. 7 lit. h) of the Organic Law No. 5/2000 on the regulation of penal responsibility of minors. According to art. 9 of the same law, the duration of the measure may not exceed two years, and in the case of persons who have reached the age of sixteen at the time of committing offences, the duration of the measure can reach a maximum of five years, provided that the offence has been committed with violence or intimidation of victims or have presented a serious risk to the life or physical safety of victims the exception being the cases judged to be extremely serious, the judge will impose a measure of internment in closed regime from one to five years, supplemented by educational assistance and supervised freedom up to a maximum of five years. In the future criminal legislation in our country, educative measure of supervision, as provided for in art. 118, consists in controlling and guiding the minor under its daily, for a period of between two and six months in order to ensure participation in school courses or training and the prevention of activities or entry in relation to certain individuals which might affect its straightening process under the auspices of the probation service.

One aspect that we appreciate that deserves to be on probation for attention as educative measure of supervision refers to the likelihood of a common application of this measure by the courts, especially in the early years after the entry into force of the new Criminal Code of Romania, judges are already familiar with the educational measure referred to supervised freedom the criminal law in force.

Consignment during the weekend to us as it is regulated as imprisonment, last in the string increasing in terms of severity, unlike the Spanish model where it is regulated as a measure involving deprivation of liberty, art. 7 let. g) of the Organic Law No. 5/2000 on the regulation of penal responsibility of minors. Minors who are subjected to this measure will stay at home or in a centre, up to a maximum of thirty-six hours between Friday evening and Sunday evening, except for the time necessary for socio-educational tasks assigned by the judge, under the supervision of a person appointed under an individual program.

According to art. 9 of the same law, the measure of stand-by duty at the weekend may not exceed eight weekends and in the case of persons who have reached the age of sixteen at the time of committing offences and the offence was committed with violence or intimidation of victims or the deed presented a serious risk to the life or physical safety of victims, the duration of the measure may not exceed sixteen weekends, the exception being the cases judged to be extremely serious.

In the new Romanian Criminal Code of the educational measure of consignment during the weekend is referred to in art. 119 and consists in the obligation of the minor not to leave home for the duration of breaks consecutive week for a period of between 4 and 12 weeks on Saturdays and Sundays, except in cases where they have an obligation to participate in certain programs or to conduct certain tasks imposed by the Court, surveillance can be done under the auspices of the probation service.

Daily assistance is provided in the new Romanian Criminal Code as the most severe non-custodial educational measure; is also the Spanish inspiration provided by art. 7 let. f) of the Organic Law. 5 / 2000 on the regulation of penal responsibility of minors, which is regulated as a center to assist in the day. Minors who are affected by this measure live at home and come to a community center that is designated by the public entity responsible for execution of the center closest to the child's home where there is space available; in the center they participate at support of education, training, work or leisure activities, establishing frequency of participation in day center and hours of attendance, which must be compatible with their education if they are between basic school and, where possible, with their work.

The new Romanian Criminal Code to assist daily educational measure is provided in art. 120 and the minor is required to meet a schedule set by the probation service, for a period between 3 and 6 months, the program must include schedule of activities and conditions, and restrictions imposed on the child, realizing supervision coordinated by the probation service.

A feature of the most severe educational non-custodial measures is that the only possibility under the new Romanian Criminal Code to replace custodial educational measures. Where, during internment, the minor has shown a constant interest for acquiring knowledge and professional school and has made tangible progress in social reintegration, after the execution of at least half the length of stay, the court may order a replacement measure of internment in an education center or the measure of internment in a detention center to the educative measure of daily assistance for a period equal to the length of stay served, but no longer than 6 months if hospitalized person below the age of 18. As the educational measure of probation supervision is of interest to consider that this observation as far as assisting educational day will be one common in all non-custodial educational measures enforced by the probation services.

4. ROLE OF PROBATION IN APPLYING THE EDUCATIONAL NON-CUSTODIAL MEASURES

In September 2011, Romanian Probation System celebrated 10 years of existence and managing the educative non-custodial measures will be only a part of the significant multiplications of probation competences.

We think that coming into effect of the new Romanian Criminal Code is a turning point for the evolution of the probation system, which is called to offer quality services also in the future even if the socio-economical context is less favourable, taking into consideration austerity budget and restricted material and human resources.

We can identify solution to a successfully change: to capitalize the most important resource of the system: people, with their experience acquired in years of work and their ability to adapt and to innovate. We have to choose the methods techniques and working instruments that we know that are viable, we have to choose the strategies that worked, to reinvest the professional capital gained in partnership with other institution from justice system or from community and, not least, we have to learn from other probation system, especially European systems, who experienced a major change. This is possible if we have an favourable answer from institution: the laws subsequent the new Romanian Criminal Code and the new Romanian Criminal Procedure Code, the draft Law on execution of punishments and measures in deprivation of liberty ordered by the judicial bodies during the criminal trial and the draft Law on the organization and operation of Probation; all of them are now on the government agenda.

In the first law project, the accent is put on (re-)phrasing the working mechanisms inside justice system and using resources from the community in probation activities, probation service being responsible to coordinate supervising

processes. The second law project has in view involving minor's families and other support network in applying educational non-custodial measures.

In the draft Law on execution of punishments and measures in deprivation of liberty ordered by the judicial bodies during the criminal trial will be established:

- The competence of the supervisory judge, increasing his involvement in making decision during sentence.
- The relationship between the probation counselor and the supervisory judge.
- How the institution from community participate in execution of educative non-custodial measures according to minimum standards for work in probation, which are to be approve by government decision, elaboration of civic courses based on a framework program, institutions' obligations etc.
- How to involve in putting in execution the educative non-custodial measures, together with institutions and public authorities and another institution from community.
- Elaboration of a transparent procedure enabling community institutions.
- Elaboration of a national data base with institutions from community enabled.

The draft Law on the organization and operation of Probation propose also a deeply reform of the national probation system and a reform of the processes, activities and working instruments:

- Setting up a central structure in the Ministry of Justice, with legal personality, which implies own budget, unified management of resources, setting up a specialized department for minors.
- Regulation of the possibility that this structure could receive donations and access other funding sources.
- Reorganization of the local structures of the probation system both territorially (secondary offices, other offices), and functional (specialized compartment for minors).
- Encourage researches and studies regarding probation system and specialize the staff.
- Increasing community involvement through outsourcing of services, setting up inside Probation Direction's budget a found for outsourcing of services.
- Increasing the probation counselor's active role regarding execution of educational measure according to article 511 from new Romanian Criminal Procedure Code by making suggestion regarding minor supervision if the judge didn't mention it in the sentence.
- Bringing in case management concept.
- Increasing the probation counselor's responsibility as case manager and regulation the documents issued by the counselor.
- Using new working instruments, like minor's probation dossier, evaluation rapport for the minor who execute an educative measure.

A short presentation of probation service's competences regarding coordination of surveillance the execution of educational measures is presented below.

If the probation service is authorized to enforce the educative measure of attending a civic program, the probation counselor manager of the case establish, based on a initial evaluation and the minor's particularities, the type of the civic program and in which institution from community will be attend it (school, another authorized institute, NGO), he approves the civic program's plan proposed be the institution, he collaborated with parent/the person who is in charge with surveillance, if it's necessary, and he verifies how the program concerning both the minor and the institution.

When the probation counselor, case manager, enforces the educative measure of supervision, collaborates with parents, tutors or a relevant person for the minor who surveillances the minor, he guides him regarding minor's daily plan, he approves minor's daily plan proposed or revised, he collaborates with the community if the court imposed to attend school or vocational education; he supervises surveillance concerning both minor and the person who exercises surveillance and guides the minor daily.

If the minor has to be consign during the weekend, the involvement of the probation counselor and the community increases: the probation counselor writes the plan of consign during the weekend, after consulting the person who exercises minor's surveillance and the minor, he supervises surveillance process concerning both the minor and the person who exercises minor's surveillance, the adult who lives with the minor or another adult established by the court, he collaborates with the community if the court imposed attending to a certain program (social reinsertion) or attending school or vocational education. Plus, the case manager can decide that an institution from community supervises the way that minor complies with the measure and how the surveillance is done and the probation counselor, manager of the case, exerting control, collaborates with the police.

Enforcing the educational measures of daily assistance, the probation counselor, case manager, draws up a daily assistance plan, containing schedule and the terms of activities and also minor's forbiddances, involving the parents, tutors or the person who take care of the minor, consulting the minor. The probation counselor case manager can decide that a person from an institution from community supervises the way that minor obeys the measure and how the surveillance is done, and the probation counselor, manager of the case, exerts control both regarding the way the minor execute the measure and also regarding the institution from the community who oversees minor, if necessary.

We consider, based on this presentation, that organizing the minor's surveillance in his living environment is a complex process, which will be characterized mostly by difficulties and obstacles in the beginning.

Structure of minor's delinquent personality isn't made in a certain moment and it isn't made spontaneously, but is a long, continuous process of forming antisocial behaviors, under the action of environmental factors where the minor lives, the models given (or lack of models) and the social global environment where the socialization is made.

The difficulties consist in achieving the convergence of targets followed: on the one hand strengthening the bonds between the minor and his family and community, free development of minor's personality, capitalization of his abilities and human potential and, on the other hand, involving the minor in different programs adapted to his characteristics in order to improve his behavior, to train in a spirit of responsibility and respect for rights and freedom of others.

To have a real contribution in creating *the social human being*, in forming the minor's personality, unique bio-psycho-social structure, ethnic and cultural, we consider that we need an improvement of practice by capitalization of all the results of human and human evolution sciences and all the advantages brought by the present level of human society development. And we also need *enthusiasm, open mind and courage*.

We think that a sketch for a possible beginning could include:

– Supporting the development of a coalition of NGOs who action in child protection field and juvenile delinquency prevention having as purpose running programs with national coverage.

– Setting up a foundation in collaboration with natural or legal persons from university, academic and diplomatic area, from business, NGOs and professional organizations from our country or abroad, who allowed an inter- and multidisciplinary approach, base to support new lines of action in dealing with juvenile delinquents and to allow use of external sources of funding (see Memorandum approved by the Government at the hearing on August 17, 2011, entitled “Ministry of Justice initiative to set up a foundation aimed at supporting and promoting the principles of law, democracy and the rule of law” and experience setting up the Foundation for Promotion of Community Sentences which opened its first workshop in Romania for community service performed by convicted persons).